AUG 29 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-237

TEAMSTERS LOCAL UNION 377,
Petitioner,

v.

WILLIAM SCOTT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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v.

WILLIAM SCOTT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Teamsters Local Union 377 petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on April 30, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, pp. A-1-A-14) is not yet officially reported, but is unofficially reported at 73 CCH Labor Cases ¶ 14,502 and 86 LRRM 2190. The

Judgment of the United States District Court, Northern District of Ohio, Eastern Division (App., infra, p. A-16) was not reported.

JURISDICTION

The Judgment of the Court of Appeals (App., infra, pp. A-1-A-14) was entered on April 30, 1974. On July 25, 1974, this Court granted Petitioner's Application for an Extension of Time within which to file this petition to and including August 31, 1974 (App., infra, p. A-15). The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Whether a trial court, in an employee's Section 301, 29 USC § 185, damage action against a union for breach of duty of fair representation for failure to process a grievance challenging an employer's discharge of the employee, is required to award attorney fees to the employee absent a finding of overriding considerations upon which such fees are customarily based.

2. Whether a trial court's permission, in a Section 301 jury trial proceeding, to a litigant to amend his complaint to include a request for an after trial court award of attorney fees mandates that the issue of attorney fees be submitted to a Jury during trial.

3. Whether a discharged employee who fails to invoke the grievance procedures of the collective bargaining agreement within the time or in the manner specified by that agreement may maintain an action against the union for breach of the duty of fair representation by reason of the union's failure to process an untimely grievance protesting the discharge.

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act, 29 USC § 185, is set forth at App., infra, pp. A-18-A-19.

STATEMENT OF THE CASE

Plaintiff William Scott instituted this action under Section 301 of the Labor Management Relations Act, 29 USC § 185, joining as Defendants Anchor Motor Freight, Inc. and Teamsters Local Union 377. Plaintiff alleged that his employer, Defendant Anchor Motor Freight, Inc. had, without proper cause and in violation of its agreement with Defendant Union, wrongfully discharged him. Plaintiff further claimed that his collectiv bargaining representative, Defendant Teamsters Local Union 377, breached its duty of fair representation in failing to process a grievance protesting the discharge. Plaintiff's Complaint, in separate counts, sought damages from Defendant Anchor Motor Freight for the alleged wrongful discharge, and from Defendant Union for breach of duty to properly represent Plaintiff in processing his grievance.

Defendant Anchor Motor Freight, Inc. employed Plaintiff William Scott as an interstate truck driver in connection with its operation of a terminal at Lordstown, Ohio. Anchor's principal business at this terminal consists of transporting, by truck tractor and trailer, automobiles manufactured by the General Motors Corporation at its Lordstown, Ohio plant to dealerships throughout the eastern part of the United States. Anchor Motor Freight's activities as a contract carrier for the General Motors Corporation are subject to regulation by the Interstate Commerce Commission.

On July 23, 1966, Plaintiff Scott was discharged by Defendant Anchor Motor Freight Company, Inc. At the time of the discharge Plaintiff was employed under the terms of a col-

lective bargaining agreement administered by Defendant Teamsters Local Union 377, whose offices are situated in Youngstown, Ohio. Plaintiff has not, at any time, contended that Defendant Union caused, participated in, or was in any manner responsible for the company's decision to discharge him.

After his discharge, Plaintiff returned to his home in Fort Thomas, Kentucky where he prepared and mailed to the union two letters; one advising Defendant Union of his discharge, and the other complaining of treatment he had received while in the employ of Defendant Company. The communications were received by the union on August 4, 1966, some twelve (12) days after employment termination.

The collective bargaining agreement under which Plaintiff was employed required that grievances appealing discharges be taken within ten (10) days by written notice. Neither Plaintiff nor Defendant Union notified the employer within the time period specified in the contract that the propriety of the discharge was being challenged, or that the matter was being appealed under the contract's grievance procedure.

Thereafter, Plaintiff initiated this action. While the cause was pending and before trial, the Court permitted Plaintiff to amend his complaint to include a request ". . . that after the trial of this action, the Court award plaintiff reasonable attorney fees." The cause was submitted to a Jury. A Special Verdict was returned in favor of Plaintiff against both Defendants. The Jury found that Plaintiff had been wrongfully discharged by Defendant Company, and assessed damages against the company in the sum of $12,500. The Jury further found that Defendant Union failed to provide Plaintiff with fair representation, and notwithstanding the failure of Plaintiff to offer any proof of damages caused by Defendant's breach of duty, assessed damages against Defendant Union in the same amount, $12,500.00. Judgment was entered, accordingly, by the trial court. (App., infra, p. A-16)

After return of the Jury's verdict, Plaintiff filed a Motion for an Award of Attorney Fees. The trial court overruled Plaintiff's Motion, explaining:

> "The jury's verdict of $12,500 against defendant Anchor Motor Freight must, therefore, necessarily represent the jury's finding as to the damages sustained by plaintiff as the result of said defendant's breach of contract.
>
> "Further, the jury's verdict of $12,500 against defendant Teamsters Local Union No. 377 must necessarily represent the jury's finding as to the extent that said defendant's conduct in refusing to handle plaintiff's grievance added to the difficulty and expense of collecting from defendant Anchor Motor Freight." (App., infra, p. A-18)

Ruling that the verdict against the union adequately compensated Plaintiff for the difficulty and expense of collecting from defendant employer, the court concluded ". . . that a further award of attorney fees would be inappropriate." (App., infra, p. A-18)

The Defendant Company and Defendant Union, in separate appeals, appealed to the United States Court of Appeals for the Sixth Circuit from the trial court's adverse judgments. Plaintiff Scott appealed from the trial court's refusal to award him attorney fees in addition to the damages of $25,000 assessed by the Jury.

The appellate court, in a two to one decision, upheld the judgment against Defendant Company and the Jury's finding of Defendant Union's liability for failure to provide Plaintiff with proper representation. It sustained Plaintiff Scott's appeal holding that the jury's verdict of damages against Defendant Union, having been made in the complete absence of evidence concerning attorney fees, was purely speculative and could not stand. The Court, accordingly, vacated the judgment against

the union and remanded the cause to the District Court with instructions ". . . for a comprehensive determination of damages incurred by Scott [Plaintiff] as a result of the Union's breach of its duty of fair representation". (App., infra, p. A-11)

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is in Conflict With Applicable Decisions of Other Courts of Appeals.

In instructing the Jury on the issue of damages, the Trial Court charged that the union was responsible, if found to have breached its duty of fair representation, for the amount that the union's refusal to process Plaintiff's grievance added to Plaintiff's difficulty and expense of collecting from the employer. The instruction was given even though Plaintiff had neglected to offer any evidence relating to added difficulty or expense in collecting from his employer. The Appellate Court approved the instruction as being wholly consistent with applicable principles of law declared by this court in *Vaca v. Sipes*, 386 US 171, 87 S Ct 903 (1967), and *Czosek v. O'Mara*, 397 US 25, 90 S Ct 770 (1970). (App., infra, p. A-9, Note 4) But, it reasoned, inherent in the instruction is the direction or invitation to the Jury to include an assessment of attorney fees. Therefore, since the Jury was not presented with any evidence of attorney fees, the verdict against the union was fatally defective in its want of evidentiary support. Concluding that the trial court misled Plaintiff and was, therefore, responsible for the defect (App., infra, p. A-11), the court vacated the Jury's verdict against the union and remanded the cause to the district court for another determination of damages caused by Defendant Union.

The holding of the Court of Appeals below that an award of attorney fees is an integral and, therefore, recoverable element of employee damage in a proceeding against a union for breach of duty under Section 301 not only misinterprets the holdings of this Court in *Vaca* and *Czosek*, supra, but creates a significant conflict among the Circuit Courts of Appeals.

In *Vaca v. Sipes*, supra, this Court examined the liability of a union which improperly failed to process a grievance on behalf of a discharged employee, and limited that liability as follows:

> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of Owens' [Plaintiff] damages would still be attributable to his allegedly wrongful discharge by Swift [Employer]. For these reasons, even if the Union here had properly been found liable for a breach of duty, it is clear that the damage award was improper." 386 US at 197-198

More recently, in *Czosek v. O'Mara*, supra, the Court reaffirmed its position concerning the extent of a union's liability in an unfair representation case. Noting that a union may be held liable for only those damages which flow from its conduct, the Court stated:

> ". . . Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except

> to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." 379 US at 29

Nothing in the opinions of this court support the court below's conclusion that a wrongfully discharged employee must be allowed to recover attorney fees in suits against the union for breach of the duty of fair representation. To the extent that the Sixth Circuit holds that Section 301 mandates an award of attorney fees to a successful litigant, the decision conflicts with the holdings of the Fourth Circuit in *Local Union 149, UAW v. American Brake Shoe Co.*, 298 F 2d 212 (4th Cir. 1962), cert. den. 369 US 873, 82 S Ct 1142 (1963); the Eighth Circuit in *Local 4, IBEW v. Radio Thirteen-Eighty, Inc.*, 469 F 2d 610 (8th Cir. 1972); the Tenth Circuit in *New Park Mining Company v. United Steelworkers of America, Local 2464*, 288 F 2d 225 (1961); and even with prior decisions of the Sixth Circuit Court of Appeals.[1] In each of these decisions the courts have held the appropriateness of an award for attorney fees to be within the discretion of the trial court, a discretion to be exercised in the light of equitable rather than purely legal considerations. Cf. *United Steelworkers of America, AFL-CIO v. Butler Mfg. Co.*, 439 F 2d 1110 (8th Cir. 1971); *International Union of District 50, United Mineworkers of America v. Bowman Transportation, Inc.*, 421 F 2d 934 (5th Cir. 1970); *Rolax v. Atlantic Coast Line RR Co.*, 186 F 2d 473 (4th Cir. 1951); *Local 205, United E. R. & M. Wkrs. v. General Electric Co.*, 172 F Supp 960 (D. Mass. 1959); *Belo Corp. v. Typographical*

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[1] In *St. Clair v. Teamsters Local 515*, 422 F 2d 128 (6th Cir. 1969), the court set aside a verdict of $5,000 against a union. The court held, in a situation paralleling the facts at bar that:

> "The calculation of who caused which damages may present serious practical problems, but the Supreme Court has strongly implied that in cases like this, involving a discharge and an alleged failure by the union to take all available steps to remedy the employee's complaint, the increment of damages caused by the union's breach of duty is virtually de minimis." Id., at 132

Union, 82 LRRM 2574 (DC Tex. 1972), aff'g 471 F 2d 651 (5th Cir. 1973); *Retail Clerks, Local 20 v. Lane County Independent Grocery Employees Committee*, 81 LRRM 2671 (DC Ore. 1972); *Dallas Typographical Union No. 173 v. A. H. Belo Corp.*, 372 F 2d 577 (5th Cir. 1967); *IBEW, Local 494 v. Artkraft, Inc.*, 86 LRRM 3111 (ED Wisc. 1974); See also: *Thomas v. Honeybrook Mines, Inc.*, 74 LRRM 2337 (3rd Cir. 1970), den rehear'g and modif'g 428 F 2d 981.

Except for the holding below, the Court of Appeals, in Section 301 proceedings, have applied the traditional American rule governing awards of attorney fees in federal litigation. Attorney fees have been held to be appropriate only where the trial court, in the exercise of its equity powers and in the presence of an overriding consideration, concluded that such an award was necessary to effectuate the purposes of the Act. This is the first and only holding that attorney fees are mandated and are recoverable as an integral part of the damage suffered by a successful § 301 litigant as a matter of right.

The conflict reflected in the decisions of the several courts of appeals has not been addressed by this court. The issue is involved in every Section 301 proceeding. It can be authoritatively resolved by this court only.

II. The Remand of This Cause by the Court Below on the Issue of Attorney Fees, With Direction That the Lower Court Submit the Issue to a Jury, Is Not Authorized.

A. Section 301 of the Labor Management Relations Act does not expressly provide for the allowance of attorney fees to a successful litigant.

There is no indication in the language of the statute, committee reports or floor debates that Congress desired to authorize the allowance of attorney fees as a standard remedy in ac-

tions instituted under Section 301.[2] The overriding Congressional objective manifested in the legislative history of Section 301, is the desire to make parties to collective bargaining agreements amenable to suit for breach of contract and to provide a forum for such actions. See House Report No. 245 on H.R. 3020, reported at 1 Legislative History of the Labor Management Relations Act, 1947, page 337; Senate Report No. 105 on S. 1126, Id., at 421. See also comments by Senators Taft, Smith and Ball, respectively reported at 2 Legislative History of the Labor Management Relations Act, 1947, pages 1014, 1145, 1146, and 1497.

Certainly there are substantive remedies to be afforded under §301, but such remedies are fashioned "from the policy of our national labor laws", and by "looking at the policy of the legislation and fashioning a remedy that will effectuate that policy". *Textile Workers Union v. Lincoln Mills*, 353 US 448, 77 S Ct 912 (1957). It was not the legislative intent to specify remedies in Section 301, but to provide a forum in which the relief could be molded by the nature of the problem presented.

Nothing in either the text of Section 301 or its legislative history justifies an automatic allowance of attorney fees in an action instituted under Section 301. The Act's very silence militates against a conclusion that the legislation contemplates recovery of counsel fees.

B. In the absence of express statutory authorization, an award of attorney fees is within the court's historic equity jurisdiction and is proper only when overriding considerations of justice compel such relief.

This Court has, on several recent occasions, examined the role of attorney fees in federal court litigation. The most recent

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[2] When Congress desires to fashion such a remedy, it is able to do so by clear and explicit language. See, for example, 29 USC § 431 (c), 29 USC § 501(b); compare the language of § 301 to § 303 of the LMRA, 29 USC § 187, a companion statute of § 301.

and comprehensive inquiry and explanation occurred in *F. D. Rich Co., Inc. v. Industrial Lumber Co.*, — US —, 40 L Ed 2d 703, 94 S Ct — (1974). In that case, the successful Plaintiff argued that he was entitled to attorney fees in a suit under The Miller Act, 40 USC §§270, et seq. The Miller Act, like Section 301 of the Labor Management Relations Act, does not explicitly provide for an award of attorney fees to a successful litigant. The Court of Appeals, as the court below, reversed the trial court's judgment denying recovery of attorney fees, and remanded for trial court consideration the amount of attorney fees to be awarded. This court reversed the judgment of the Court of Appeals, . . . insofar as it holds that an award of attorneys' fees to respondent Industrial is required by the Act." 40 L Ed 2d at 715. In so holding, the traditional rule governing an award of attorney fees was reaffirmed.

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that 'attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' Fleischmann Distilling Corp. v. Maier Brewing Co., 386 US 714, 717, 18 L Ed 2d 475, 87 S Ct 1404 (1967)." Id., at 712

There are, of course, exceptions to the general principle that each party bear the costs of its own legal representation. However, these exceptions pertain only, "when overriding considerations of justice seemed to compel such a result." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 US 714, at 718, 87 S Ct 1404 (1967). Whether "overriding considerations of justice" are present in an individual case is an equitable issue for the trial court. In *Sprague v. Ticonic National Bank*, 307 US 161, 59 S Ct 777 (1939), this Court, in holding that the award of attorney fees is an extraordinary, equitable remedy, the granting of which was within the discretionary powers of the trial court judge, explained:

". . . Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." 307 US at 166

These settled principles governing the allowance of attorney fees are applicable to actions under federal laws by a union member against his union. In *Hall v. Cole*, 412 US 1, 93 S Ct 1943 (1973), jurisdiction stemmed from Section 102 of the Labor Management Reporting and Disclosure Act, 29 USC §412. Section 102 is silent on the subject of attorney fees. There, it was hotly contested that legislative silence barred recovery of such fees. While noting that in the absence of statutory or contractual authorization, attorney fees are not ordinarily recoverable, this court emphasized such fees may be recovered in the limited circumstances which qualify as established exceptions to the rule. Again, it was clearly held that the considerations which justify an exception to the traditional rule are "best addressed to the sound discretion of the District Court. 412 US at 15

In the case at bar the trial court, after careful review of the pertinent facts and in the exercise of its discretion, concluded that an additional award of the attorney fees was inappropriate. The decision of the trial court rested upon its conclusion that the Jury's Verdict adequately compensated Plaintiff for the wrong claimed by him. Absent a showing that the trial court's conclusion was without reason, was not based on fact or was arbitrary or capricious, it should not have been disturbed by the Court of Appeals.

C. **An application for an after trial award of reasonable attorney fees does not excuse plaintiff's failure, during trial to present to the jury any evidence of damage attributable to the union's dereliction, nor does it justify remanding the cause for reassessment of damages to cure a wholly speculative verdict.**

With permission of the Court, and prior to trial, Plaintiff amended his Complaint to recite:

> "Plaintiff further prays that after trial of this action, the court award plaintiff reasonable attorney fees." (App., infra, p. A-10)

For unrevealed reasons Plaintiff refrained, during trial, from introducing any evidence relating to the added difficulty and expense experienced by reason of the union's failure to process his grievance. Plaintiff's amended complaint indicates the desire to reserve the issue of attorney fees to a post hearing determination by the trial judge, but it does not explain or justify the failure to introduce evidence relevant to the damage sought from the union. The failure can not be explained, as the court below suggests, by the trial court's permission to amend the complaint to include a prayer for reasonable attorney fees, and the court's subsequent denial of Plaintiff's motion for an allowance of attorney fees. A prayer for attorney fees differs in no material respect from a prayer or demand for damages. Neither prayer changes a Plaintiff's burden of proof. Each requires the submission of probative evidence before the prayer may be granted. The conclusion of the Appellate Court that Plaintiff was misled by the trial court's permission to amend his complaint is untenable. At best, the trial court promised it would consider "After the trial of this action" Plaintiff's prayer for an award of reasonable attorney fees. The court did not commit itself to the granting of the motion, nor did the allowance of the motion change Plaintiff's burden of proof or wave the court's

obligation to weigh the prayer in the light of the facts developed at trial.

The Appellate court correctly concluded that the Jury verdict against the Union "necessarily rests on a sheerly speculative foundation and cannot stand." (App., infra, p. A-11) The defect, however, consists not of a want of evidence concerning reasonable counsel fees, but rather of a total lack of evidence relating to union caused damages. The vice due to Plaintiff's inexcusable failure to carry his burden of proof can not be properly or fairly corrected by requiring Defendant Union to bear the risk and expense of another trial.

III. **An Employee's Failure to File a Grievance in the Time or Manner Specified in the Collective Bargaining Agreement Precludes Judicial Entertainment of the Employee's Suit for Damages.**

It is well settled that exhaustion of contract grievance procedure is a prerequisite to federal court jurisdiction under Section 301. *Republic Steel Corp. v. Maddox*, 379 US 650, 85 S Ct 614 (1965). The collective bargaining agreement at bar, in unambiguous terms, required Plaintiff to file an appeal from his discharge, in writing, within ten (10) days of the discharge. The appeal is to the employer, since it is the employer who caused the discharge. Plaintiff made no showing that he attempted to satisfy his obligation to comply with the procedural requirements of the collective bargaining agreement.

It is the agreement between the union and the company which creates the contractual obligation to serve written notice upon the employer within the time stated in the contract. Good faith administration of the agreement requires the union to pursue and process those grievances only which are meritorious. Processing of grievances untimely filed is not part of the bargain and,

indeed, is a burden which the union expressly agreed it would not impose upon the employer. Moreover, as the dissenting opinion below correctly observes, the union does not have the authority to waive the employer's entitlement to written notice within the time agreed upon. Nothing prevented or excused Plaintiff from giving notice of his grievance to the employer or the union in the time and manner contemplated by the contract. As this court held in *Vaca v. Sipes*, 386 US 171, 87 S Ct 903 (1967):

> "Since the employees claim is based upon breach of the collective bargaining agreement, he is bound by terms of the agreement which govern the manner in which contractual rights may be enjoyed." 386 US at 184.

Patently, under *Vaca* principles, Plaintiff should not be permitted to hold either the union or employer responsible for damage suffered in large measure by reason of his own failure to discharge clearly specified and understood contractual obligations. To hold otherwise is to impose an impossible strain upon the collective bargaining process, condemning the parties to collective bargaining agreements to the uncertainty of undisciplined attack.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted

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APPENDIX

Nos. 73-1703, -1704, and -1705

United States Court of Appeals
For the Sixth Circuit

No. 73-1703
William Scott,
Plaintiff-Appellee,
v.
Anchor Motor Freight, Inc.,
Defendant-Appellant.

No. 73-1704
William Scott,
Plaintiff-Appellant,
v.
Anchor Motor Freight, et al.,
Defendants-Appellees.

No. 73-1705
William Scott,
Plaintiff-Appellee,
v.
Teamsters Local Union 377,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed April 30, 1974.

Before: Celebrezze, Peck and McCree, Circuit Judges.

Celebrezze, J., delivered the opinion of the Court, in which Peck, J., joined. McCree, J. (pp. 12-14) filed a dissenting opinion.

Celebrezze, Circuit Judge. Consolidated herein are three appeals from a judgment against a company and a union. Plaintiff William Scott (Scott) sued his former employer and union representative under section 301 of the Labor Management Relations Act,[1] claiming that Defendant Anchor Motor Freight (Anchor) had wrongfully discharged him and that Defendant Teamsters Local 377 (Local 377) had unfairly represented him in protesting the discharge.

Through special verdicts, the jury found that Scott had been wrongfully discharged and assessed damages against Anchor of $12,500. It also awarded Scott $12,500 from Local 377, which it found had failed to represent him properly.

Local 377 appeals the final judgment, as well as the District Court's denials of motions for judgment notwithstanding the verdict and for vacation of the judgment. Anchor appeals on identical grounds, as well as appealing a denial of a motion for a new trial. Plaintiff Scott also appeals, claiming that the District Court's denial of a post-trial motion for an award of attorney fees was erroneous.

Scott began driving trucks for Anchor in 1953. In 1964 Anchor shut down its Norwood, Ohio terminal, where Scott had been working. A new terminal was opened in Lordstown, Ohio in 1966, and Anchor offered Scott a job after a physical examination by a company doctor, who certified Scott under ICC rules though noting that he was a diabetic. Over two months later, Scott was discharged, on July 23, 1966. Anchor claims the discharge resulted from Scott's physical problems while on the job in 1966 and a second letter from its doctor, stating that Scott was unfit to drive a truck. It argues that Scott was unfit under ICC rules, so that it was merely obeying the ICC when it discharged Scott. Scott claims he was fired

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[1] 29 U.S.C. § 185.

because of his initiation of legitimate complaints against the Company. Scott introduced evidence that the company doctor had been pressured into changing his opinion as to Scott's fitness, that Anchor officials acted out of personal hostility in discharging him, and that he suffered no blackouts or other uncontrollable problems from his diabetes, which was being treated by mild medication.

Soon after his discharge Scott sent two letters to Teamsters Local 377, complaining of pay shortages for completed work and of an unfair discharge. He did not file a standard grievance form, according to Local 377, nor did he appeal his discharge in writing to the Company within ten days of his discharge. Local 377 did not press Anchor about the discharge, and Scott introduced evidence that the Union handled his protest perfunctorily and in bad faith. In December 1966 or January 1967, Scott attempted to have Local 377's steward and committeeman process a grievance concerning this discharge. There was evidence that because of the newness of the Lordstown operation, Local 377 did not have the requisite machinery to process a grievance within ten days of Scott's discharge, a time limit imposed by the labor contract for appealing discharges thought to be unfair.

Receiving no relief from the Company and no significant help from the Union, Scott, filed a complaint in District Court in April 1968, alleging an improper discharge and unfair representation by Local 377. The jury verdict followed.

The first issue we face is whether Defendants were entitled to judgment notwithstanding the verdict on the ground that Scott failed to invoke the grievance procedures set forth in the Local 377—Anchor contract. If Scott's efforts to invoke the contract grievance procedures were insufficient as a matter of law, he is barred from suing his employer and union. *Republic Steel Corp v. Maddox*, 379 U.S. 650, 653 (1965);

Durham v. Mason and Dixon Lines, Inc., 404 F.2d 864, 865 (6th Cir. 1968).

The District Court let the jury determine whether Scott had complied with the terms of the collective bargaining agreement. It instructed the jury:

> "The second question you will be asked to answer either yes or no, which, in either instance, has to be the unanimous opinion of you all, is:
>
> 'Has the plaintiff properly filed or caused to be filed in his behalf a notice of appeal from discharge in writing within the time limitation, if any, set forth in the contract?'
>
> In conjunction with that, you will be required to answer Question 2-A, which reads:
>
> 'If the answer to Question No. 2 is in the negative, has the plaintiff been excused from compliance with any required notice by the conduct of the union?'
>
> The plaintiff must comply with all conditions precedent or requirements on his part of things to be performed by him under the contract before he can recover.
>
> The contract provides in part: 'Appeal from discharge, suspension or warning notice must be taken within ten days by a written notice.'
>
> The defendants contend that the contract provides that a copy of an appeal must be filed by the plaintiff with the company and the plaintiff has failed to comply with certain provisions of the contract.
>
> The plaintiff states that the contract does not require that plaintiff file a copy of an appeal with the company and that the contract requires a filing with the union, and further, if the contract does require a filing with the company, that the plaintiff is excused from filing said appeal

or grievance with the company as a result of the conduct of the union.

I state to you that it is for you to determine whether or not the contract requires that a copy of an appeal or grievance should be filed by the plaintiff with the company and, if you determine that the contract does require the filing by the plaintiff with the company, whether or not the plaintiff's compliance with that provision is excused or waived by reason of the alleged conduct of the union.

I state to you that if the conduct of the union wilfully prevented compliance with the contract requirement that a copy of the appeal be filed with the company, such requirement can be waived.

Likewise, the defendants contend that the contract requires that any notice of appeal or protest or grievance shall be filed within ten days of the date of discharge and the plaintiff has failed to comply with said provision of the contract and, therefore, cannot recover.

It is for your determination as to the meaning of the contract and the time when the ten-day limitation starts to run and for you to determine the plaintiff's compliance or non-compliance within the meaning of the provision of the contract, as you determine the meaning of said provision."

It is clear from *Vaca v. Sipes*, 386 U.S. 171 (1967), that an "employee must at least attempt to exhaust grievance and arbitration procedures established by the [collective] bargaining agreement," 386 U.S. at 184, before a court may entertain a claim of unfair representation against a union and wrongful discharge against an employer. "[U]nless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf." *Republic Steel Corp v. Maddox*, 379 U.S. 650, 653 (1965). Whether a plain-

tiff has done this is a question of federal law, subject to proof at trial. The evidence in this case sufficed to support a finding that Scott made a good-faith effort to invoke the contract's grievance procedure.

On August 2, 1966, Scott sent a letter to Local 377, which stated that "I feel that I am a safe driver and should be reinstated with back pay" and requested a meeting and hearing as soon as a steward and representative committee for the Lordstown plant could be elected, none having seen set up since the Lordstown operation's opening. Assuming that this letter was timely sent and properly addressed, it was a sufficient attempt to invoke the collective bargaining agreement's grievance procedure, under *Republic Steel Corp. v. Maddox* and *Vaca v. Sipes*, to give the District Court jurisdiction over the case. *Contrast Steen v. Local 163*, 373 F.2d 519 (6th Cir. 1967), where "plaintiff had made no effort whatsoever to comply with the grievance procedure," 373 F.2d at 520; and *Broniman v. Grea Atlantic & Pacific Tea Co.*, 353 F.2d 559 (6th Cir. 1965), where "there was no real attempt to use the grievance procedure," 353 F.2d at 563.

Given this conclusion, whether Scott actually wrote this letter and whether he complied with the terms of the contract in delivering it are questions of fact, subject to a jury's determination.

When a contract is ambiguous, it is for the jury to determine the meaning of its terms, subject to proper instructions and based upon "evidence of the surrounding circumstances and the practical construction of the parties." *Tennessee Consolidated Coal Co. v. United Mine Workers of America*, 416 F.2d 1192, 1198 (6th Cir. 1969);[2] *Goddard v. Foster*, 17 Wall. 123,

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[2] When a contract is unambiguous, the judge must state its proper construction to the jury rather than allow it to adopt an erroneous view of the contract. See 4 S. Williston, Law of Contracts 303 (3d ed. 1961). "Where, however, the meaning of a writing is uncertain or ambiguous, the question of its meaning should be left to the jury." 4 Williston, 652. *Cf.* 3 A. Corbin, Contracts 226-27 (1960).

142 (U.S. 1872); *Local 783 v. General Electric, Co.*, 471 F.2d 751, 757 (6th Cir. 1973). Article 32 stated that appeals from discharge "must be taken within ten days by a written notice." The contract is ambiguous as to when the ten-day limit begins to run and whether notice must be sent by the discharged employee to the employer (rather than solely to the union). The District Court properly allowed the jury to resolve these ambiguities, and the jury resolved them in favor of Scott.[3]

Thus, the District Court's instruction to the jury on Questions 2 and 2-A is not reversible error, though it might have been more clearly stated and have better explained the legal principles that bound the jury's quest for truth. Likewise, the jury's conclusion is not reversible.

The second issue before us is whether Defendant Anchor was entitled to judgment notwithstanding the verdict or a new trial on the ground that, as a matter of law, Scott's discharge cannot be deemed wrongful.

Anchor sought instructions from the District Court that would essentially have stated that if the jury found that the Company's doctor in good faith refused to certify Scott as a fit driver under ICC rules, then it should find for Defendant Anchor. The District Court refused to give such a charge. Instead, it stated the following:

> "The first question you will have to answer is:
>
> 'Do you find that the plaintiff has established by a preponderance of the evidence that Anchor Motor breached its

[3] Article 32 provides that "Discharge must be by proper written notice to the employee and the union affected," so that the date of discharge could be construed to be the date on which the employee and the union had both received notice of the discharge. Here that date was July 26. Since Local 377 received word of Scott's request for help no later than August 4, Local 377 would have had time to press his claim within the ten-day limitation, under this reading of the contract.

contract with Local Union 377 by discharging Mr. William Scott in July, 1966'?

Under the contract, which you will have with you in the jury room, the company had full power to discharge. It was agreed that this power to discharge shall be exercised with justice with respect to the reasonable rights of both the employee and the employer. The contract also requires that judgment be exercised with just cause.

You should take into account the reasonable rights of both the plaintiff and the company and all the facts you find to be pertinent to a determination of whether this discharge was with justice and for just cause.

You may also take into consideration what, if anything, the company records show as to the nature of the plaintiff's physical condition and the duties required of the plaintiff.

You may take into consideration the company's performance relative to other employees with disabilities.

You may also take into consideration whether or not a warning was served upon the plaintiff and the effect of the service or lack of service on the plaintiff and the effect of the same on the respective rights of the parties.

I have used the term 'justice.' Justice means to act with equity, in fairness.

I have used the term 'just cause.' Just cause means a cause based upon reasonable ground and a fair and honest cause or reason regulated by good faith on the part of the party exercising the power to terminate."

This charge allowed the jury to determine the meaning of "just cause" under the contract. The meaning of this phrase was

hotly disputed by the parties. Anchor argued that a good-faith refusal of its doctor to certify a driver should amount to just cause, as a matter of law, even if the jury were to conclude that the doctor had made a mistake and that Scott qualified under ICC rules. Scott argued the opposite, claiming that it is unjust to discharge an employee when the asserted reason is based on an error of a company's agent.

Under *Tennessee Consolidated Coal Co. v. United Mine Workers of America*, 416 F.2d 1192, 1198 (6th Cir. 1969), ambiguous terms of a contract are to be construed by the jury, not by the judge. This rule makes sense particularly in the present context. "Just cause" was deliberately inserted into the collective bargaining agreement to give an arbitrator, the final forum envisioned under the contract, significant flexibility in adjusting the rights of employer and employee. When the arbitrator's function is assumed by a court, because the grievance machinery has not functioned and an aggrieved employee asserts his right to a court test of his claim under *Vaca v. Sipes*, the job of interpreting "just cause" should be given to the jury. Based on evidence of company practice, treatment of similar employees, and other relevant factors, the jury should be free to exercise its judgment in determining whether the plaintiff employee's discharge was "for just cause." We consider the District Court's description of that phrase proper and find no error in its charge to the jury on Question 1.

Finding the District Court's instructions on apportionment of damages proper,[4] the jury's determination of the amount assessed against Anchor not unreasonable, and no other contentions of Defendants-Appellants meritorious, we turn to Plaintiff Scott's appeal. Scott argues that the District Court abused its discretion in denying his post-trial motion for attorney fees.

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[4] The District Court's instructions on the amount of damages attributable to the union's unfair representation were taken directly from *Vaca v. Sipes, supra*, and *Czosek v. O'Mara*, 397 U.S. 25 (1970).

In April 1972, the District Court allowed Scott to amend his complaint by approving the following request:

> "Plaintiff further prays that after the trial of this action, the court award plaintiff reasonable attorney fees."

Scott claims that in reliance on the Court's action he did not present evidence at the August 1972 trial concerning attorney fees. After trial the District Court overruled a motion for attorney fees, stating that the jury verdict of $12,500 against Local 377 "must necessarily represent the jury's finding as to the extent that said defendant's conduct in refusing to handle plaintiff's grievance added to the difficulty and expense of collecting from defendant Anchor Motor Freight." The Court stated that the $12,500 verdict against Anchor necessarily represented the full extent of damages caused by its breach of contract (i.e., lost wages).

We agree with the District Court that an award of attorney fees against the employer in this case would be unjust, since the only damages for which an employer may be held are those directly caused by the wrongful discharge—that is, lost wages and related items. *Vaca v. Sipes*, 386 U.S. at 197-198; *Czosek v. O'Mara*, 397 U.S. 25 (1970).

As to Defendant Local 377, however, the District Court's conclusion must be reversed. The Court itself granted Plaintiff Scott's motion to amend his complaint, thereby advising Scott that it would consider a motion for attorney fees *after* trial. By overruling Scott's motion for an award of attorney fees (claimed to be in excess of $12,500) after trial on the ground that the jury must have included attorney fees in its estimation of damages, the Court foreclosed Scott from proving the amount of litigation costs incurred because of the Union's breach of its duty of fair representation. Yet, the District Court charged the jury to award damages against the Union in an amount representing "the extent [to which Local 377's] refusal to handle

the grievance added to the difficulty and expense of collecting from the employer." A reasonable juror would have assumed that this amount should include attorney fees.

The difficulty is that the jurors were presented with no evidence of what attorney fees were in this case, though their charge comprehended determining an amount of attorney fees. Thus, through no fault of Scott's, there was a complete absence of evidence concerning attorney fees, though they represented a major element of the damage incurred by Scott as a result of the breach of the Union's duty of fair representation. The $12,500 verdict against the Union necessarily rests on a sheerly speculative foundation and cannot stand. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

Because the erorr did not lie with Scott, we must afford him an opportunity to prove a proper amount of damages against the Union. We therefore vacate the award against Local 377 and remand to the District Court for a comprehensive determination of damages incurred by Scott as a result of the Union's breach of its duty of fair representation, under the principles of *Vaca v. Sipes*, 386 U.S. at 196-98.

The judgments against Appellants Anchor Motor Freight and Local 377 in cases No. 73-1703 and 73-1705 are affirmed, with order that the damage award against Local 377 be vacated. Costs of these appeals are to be taxed equally between Anchor Motor Freight and Local 377. The order in case No. 73-1704 is reversed, and the cause is remanded to the District Court with instruction that the amount of damages properly attributable to the breach of Local 377's duty of fair representation be assessed. Costs of this appeal are to be taxed to Local 377.

McCree, Circuit Judge (Dissenting). I respectfully dissent. The unambiguous terms of the collective bargaining agreement that governed appellee's employment required him to give

notice of his grievance to his employer within ten days of discharge, and failure to comply with this requirement defeats the action in this case. Article 32 of the agreement provides: "Appeal from discharge . . . must be taken within ten (10) days by written notice. . . . If the employee involved is not within the home terminal area when the action of discharge . . . is taken, the ten (10) day period will start from the date of his return to the home terminal." Article 7 of the agreement, concerning grievance procedures, provides, in relevant part, "Disputes and grievances shall be *put in writing and presented to the company* within one (1) week whenever possible, but in no case later than thirty (30) days after the *grievance arises.*" (emphasis added).

If these two provisions are considered together, it is apparent that wrongful discharge is a particular type of grievance about which the employee must complain within ten days, a shorter period of time than that allowed for presenting other grievances that may be less costly for the employer to remedy if the complaint proves to be meritorious. Yet, as Article 7 makes clear, all grievances must be put in writing and presented to the employer within a specified period of time after they arise. In the case of a discharge, the grievance arises at the moment the employee is discharged, not at the time written notice of discharge is received by both the employee and his union. Moreover, Article 32 refers to discharge and not to receipt of notice of discharge as the event that starts the ten day appeal period running. This interpretation is also supported by the special provision for an employee who is away from home at the time he is discharged. Although he and his union may receive notice of discharge and the employee may be actually discharged while he is on the road, the ten day appeal period does not begin to run until he is home and presumably able to press his appeal conveniently.

This interpretation of the contract, I believe, is the only one that can be made considering the instrument as a whole, and

it follows that the running of appellee's ten day appeal period commenced on July 23, the date of his discharge. It was not until the tenth day thereafter, on August 2, that appellee sent written notice of his grievance to his union. The union received this letter two days later. Appellee never notified his employer of his grievance within either the ten day period of time provided by the contract or within any reasonable period of time thereafter. Because of his failure to notify his employer of his grievance within the ten day period or even to request his union to act on his behalf at a time when it was still possible for the union to do so, he is precluded from recovering against either his employer or his union. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), *Durham v. Mason and Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968).

I believe that ambiguity can be found in the agreement only by a strained reading. However, even if the instrument were ambiguous and a jury might be permitted to determine the meaning intended by the parties to be placed upon unclear terms, reversal would still be required because the district court failed to give correct and sufficiently specific instructions to the jury about the legal rights and duties created by the instrument it was asked to construe. Although I agree that the meaning of ambiguous contractual provisions may present a question of fact to be resolved by a jury in appropriate cases, a jury, after factual ambiguity has been resolved, does not have the power to determine the legal effect to be accorded the provisions of the contract. It is a matter of elementary contract law that "[t]he determination of the legal operation of a contract, after the meaning of its language has been adopted by process of interpretation, is always for the court, because 'legal operation' is the result of applying rules of law to the facts. . . . [C]onstruction is always a matter of law for the court." 3 A. Corbin, Contracts §§ 534, 554 (1960).

Nor do I believe that under the circumstances of this case, the union could waive the employer's contractual right to receive

notice of an employee grievance. The employer bargained for this right, and although it might waive it, the union, the opposite contracting party, could not. The district court erred when it instructed the jury that the union could waive notice for the employer, and the majority opinion, by not discussing the issue, approves this error by silence. Certainly the Supreme Court's decision in *Vaca v. Sipes*, 386 U.S. 171 (1967), does not authorize this instruction. The only question in that case was whether an employee who charged his union with breaching its duty of fair representation, a matter cognizable by the NLRB as an unfair labor practice, was precluded by the preemption doctrine from pursuing directly his grievance in a judicial forum. Nothing the Supreme Court said in that opinion supports the waiver instruction given by the district court because the conduct of the union in this case did not preclude or prevent appellee from giving notice of his grievance to his employer. It may be appropriate to hold that an employer may not assert improper union conduct as a shield against an action brought by an employee when "the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance." *Vaca v. Sipes, supra*, at 185. This is not such a case.

I agree with the court's determination that the damage award cannot stand. Nevertheless, I would reverse because I believe that the bargaining agreement can be interpreted in only one way and that appellee failed to comply with its requirements for presenting his grievance. At a minimum, appellants are entitled to a new trial because the district court failed to give proper instructions to the jury on the issue of liability.

Supreme Court of the United States

No. A-1348

Teamsters Local Union 377,

Petitioner,

v.

William Scott, et. al.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 31, 1974.

/s/ POTTER STEWART
Associate Justice of the
Supreme Court of the
United States

Dated this 25th day of July, 1974.

United States District Court
for the
Northern District of Ohio, Eastern Division

William Scott, vs. Anchor Motor Freight, Inc. and Local Union #377, International Brotherhood of Teamsters, etc.	Civil Action File No. C 68-252-Y

JUDGMENT

(Filed August 18, 1972)

This action came on for trial before the Court and a jury, Honorable Leroy J. Contie, Jr., United States District Judge, presiding and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff recover from the defendant, Anchor Motor Freight, Inc., the sum of Twelve Thousand Five Hundred and 00/100 Dollars ($12,500.00) and further that the plaintiff recover from the defendant, Local Union #377, the sum of Twelve Thousand Five Hundred and 00/100 Dollars ($12,500.00). Costs of this case are assessed equally against each defendant.

Dated at Cleveland, Ohio, this 18th day of August, 1972.

LEROY J. CONTIE, JR.
U. S. District Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: DOMINIC J. OMINO, Clerk
U. S. District Court
Northern District of Ohio

By: JAMES McCANN
Deputy Clerk

United States District Court
Northern District of Ohio
Eastern Division

William Scott,
Plaintiff,
v.
Anchor Motor Freight, Inc., et al.,
Defendants.
Civil Action.
C 68-252-Y.

ORDER

(Filed May 4, 1973)

Plaintiff in the above captioned case has moved for an award of attorney fees. Upon consideration and for the reasons outlined below, said motion shall be overruled.

This court notes that under its specific instructions defendant Anchor Motor Freight could only be held liable if the jury found against said defendant for those damages attributable to its breach of contract. See *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967); *Czosek v. O'Mara*, 397 U.S. 25, 90 S. Ct. 770 (1970).

Similarly, under this court's specific instructions, defendant Teamsters Local Union No. 377 could only be held liable, if the jury found against said defendant, to the extent that its refusal to handle the grievance in question added to the difficulty and expense of collecting from the employer. See *Vaca v. Sipes*, supra; *Czosek v. O'Mara*, supra.

The jury's verdict of $12,500 against defendant Anchor Motor Freight must, therefore, necessarily represent the jury's finding as to the damages sustained by plaintiff as the result of said defendant's breach of contract.

Further, the jury's verdict of $12,500 against defendant Teamsters Local Union No. 377 must necessarily represent the jury's finding as to the extent that said defendant's conduct in refusing to handle plaintiff's grievance added to the difficulty and expense of collecting from defendant Anchor Motor Freight.

This court is, therefore, of the opinion that plaintiff has been compensated for the expense of collection from Anchor in the amount of $12,500, and that a further award of attorneys fees would be inappropriate.

Therefore, plaintiff's motion for an an award of attorney fees is hereby denied.

It Is So Ordered.

LEROY J. CONTIE, JR.
U. S. District Judge

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

185. Suits by and against labor organizations.—(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act [§§ 141-144, 151-158, 159-168, 171-

182, 185-187 of this title], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act [§§ 141-144, 151-158, 159-168, 171-182, 185-187 of this title] and any employer whose activities affect commerce as defined in this Act [§§ 141-144, 151-158, 159-168, 171-182, 185-187 of this title] shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

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In The

SUPREME COURT OF THE UNITED STATES

No. 74-237

TEAMSTERS LOCAL UNION 377
Petitioner,

vs.

WILLIAM SCOTT
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF WILLIAM SCOTT IN OPPOSITION

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In The

SUPREME COURT OF THE UNITED STATES

No. ———

———

TEAMSTERS LOCAL UNION 377

Petitioner,

vs.

WILLIAM SCOTT

Respondent.

———

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

———

BRIEF OF WILLIAM SCOTT IN OPPOSITION

———

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is an appeal of an order granting a new trial premature, when there is as yet no final judgment of damages?
2. May a plaintiff who is a victim of wrongful discharge and unfair representation recover from the union his litigation expenses, including attorney fees, incurred in collecting damages from the employer?
3. When a union acting in bad faith fails to process a meritorious grievance, is it liable for the damages proximately caused by its unfair representation?

STATEMENT OF THE CASE

Respondent William Scott (plaintiff) brought suit alleging that he was discharged without just cause in breach of the labor agreement between Anchor Motor Freight Co. (the employer) and Petitioner Teamsters Local 377 (the union), and that the union failed to provide fair representation with respect to his grievance.

The record shows that the employer disliked Scott because he filed many pay claims and complaints and was an alleged "troublemaker" (222-229, 619, 491).[1] For these reasons, the company attempted to use Scott's medical history as a mild diabetic to discharge him. Although Scott had twice been certified by the company doctor as a qualified driver (229, 602-604), the employer improperly coerced and pressured the doctor to change his professional opinion and to issue a disqualifying report, in complete contravention with medical knowledge (483-484, 634). In sum, there was substantial evidence that the discharge was pretextual and in flagrant violation of the mandates of the labor agreement.

In accordance with normal practice (127, 128), Scott filed a grievance with the union by certified mail and requested that the union arrange a hearing (621, 528, 532). Union officials verbally acknowledged receipt of the grievance and promised a hearing (151, 154, 155, 238, 313). However, the union failed to file or process the grievance and further refused to obtain a hearing, all without any stated reason (212, 541, 122-23).

There was evidence of personal hostility on the part of the union's top official John Angelo towards Scott and his

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[1] References are to the pages of the trial transcript reproduced in the joint appendix in the Court of Appeals.

fellow drivers from Southern Ohio, whom he called "hillbillies." (233, 542).

The union's bad faith representation of Scott was part of a pattern of unfair representation of Anchor drivers. There was evidence of a collusive relationship between company and union. The company did favors for union officials by hiring their relatives and by arranging for the loan and purchase of autos (62, 63, 114, 115). The union returned the favors by adopting, without protest, a "sweetheart", illegal, pre-hire rider negotiated when there were no drivers on the payroll and by providing virtually no union representation during the period May 1 to August 19, 1966. At the time of Scott's discharge, there was no union steward, no union grievance committee, and no procedures established for implementing the contractual grievance procedure (209, 399, 471, 543).

The union deceived Scott into believing it was going to help him, yet made no investigation of his case, never reviewed the applicable documents, and secretly acquiesced in the company's version of the case without any communication with Scott (122-123, 279, 519). At the trial, the union did not help Scott but rather vigorously resisted his claims against the employer for wrongful discharge; and all grievances and correspondence from Scott to the union were mysteriously missing from the union files subpoenaed to court (113, 534).

In special verdicts, the jury found the employer had discharged plaintiff without just cause; that plaintiff properly filed his notice of appeal within contractual time limits; and that the union breached its duty of fair representation. The plaintiff produced much evidence showing that the union's unfair representation had not only increased plaintiff's damages over and above damages caused by the employer but also made it more difficult for plain-

tiff to collect damages from the company. The jury returned a verdict of $12,500 against the union.

Plaintiff opted to seek attorneys fees as part of costs, rather than as part of damages at law.[2] The court granted his pretrial motion to amend the complaint which stated plaintiff's intent to bring the matter of attorney fees to the court's attention after the trial, through the invocaion of the court's historic equitable powers. However, the trial court denied plaintiff's post-trial motion for fees, holding that the damage award of $12,500 was full compensation for "expenses of collection."

Scott appealed from the trial court's refusal to grant fees. The Court of Appeals reversed the order denying fees, reversed the damage award against the union as speculative, and remanded the issues of damages, including attorney fees, for a new trial.

In this appeal the union does not contest the finding that Scott was discharged unjustly, and does not contest that the union acted in bad faith in its handling of the grievance. The union's major contention is that the court erred in granting a new hearing on the issue of damages including attorney fees.

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[2] When a suit for 8(b)(1)(a) violation against the union and a claim for breach of contract against the employer under Section 301 are consolidated for jury trial as in the Scott case, it may be difficult to assess the attorneys fees chargeable to the union, since at that point there has been no recovery. A post trial motion for fees may be more appropriate. However, when the case proceeds alone against the union and the amount of damages collected from the employer has been liquidated at time of trial, as will be the case upon remand in the case at bar, it is appropriate to introduce evidence of fees as part of damages.

ARGUMENT

1. THIS APPEAL FROM AN ORDER GRANTING A NEW TRIAL IS PREMATURE SINCE THERE HAS BEEN NO FINAL JUDGMENT OF DAMAGES AGAINST PETITIONER.

At present, there is no judgment against the union, which conceeds that its only present detriment is the necessity "to bear the risk and expenses of another trial." (p. 14 petitioner's brief). Yet it is hornbook law that the granting of a new trial is not an appealable order and that any appeal must await the result of the new trial. The rule is summarized in 9 *Moore's Federal Practice* ¶ 110.11 (2d ed. 1973): "an order adjudging liability but leaving damages to be subsequently determined by a master or by some other mode of trial has not finally determined the action and normally lacks finality."

Leading cases which set forth the rule that an order adjudging liability but remanding the case for a new hearing on damages is not final and not appealable are *Martinez* v. *International Banking Corp.*, 220 U.S. 214 (1911); *Western Geophysical Co. of Am., Inc.* v. *Bolt Associates, Inc.*, 463 F.2d 101 (2nd Cir. 1972), cert. denied 409 U.S. 1040; *Taylor* v. *Board of Education, etc.*, 288 F.2d 600 (2nd Cir. 1961); *Petrol Corporation* v. *Petroleum Heat & Power Co.*, 162 F.2d 237 (2nd Cir. 1947); *Leonidakis* v. *International Telecoin Corp.*, 208 F.2d 934 (2nd Cir. 1953).

Although it is true that technically the Supreme Court of the United States has more discretion in ruling upon petitions for certiorari than in appeals, this Court has shown great reluctance to review a judgment that is less than final, see generally, C. Crick, *The Final Judgment*

as a Basis for Appeal, 41 Yale L. Rev. 539 at 556 (1932). In *Brotherhood of L. F. & E.* v. *Bangor & A.R.C.,* 389 U.S. 327 (1967), the court denied certiorari in a per curiam opinion, where the Court of Appeals had ruled on various issues presented and remanded the case to the District Court to consider other points in regard to contempt and the amount of fine to be imposed. The Court noted ". . . because the Court of Appeals remanded the case, it is not yet ripe for review by this court." Id. at 328. This decision would seem to support the applicability of the final judgment rule to certiorari.

This salutory principle is particularly applicable in the case at bar. The evidence concerning damages, fees and expenses and applicable law concerning the amount due to plaintiff will only be fully developed after trial below and after the lower courts have had the opportunity to review the law in the context of the evidence at the new trial. Thus, if this Court is desirous of pronouncing upon this question, it will have a better opportunity to do so after a full and complete record is made.

II. THE COURT CORRECTLY HELD THAT LITIGATION EXPENSES, INCLUDING ATTORNEY FEES, ARE RECOVERABLE AGAINST A UNION IN AN UNFAIR REPRESENTATION SUIT.

The leading case is *Czosek* v. *O'Mara,* 397 U.S. 25 (1970) where this Court held:

> "Damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and *expense of collecting from the employer.*" (Emphasis added)

In the case at bar Scott will receive $12,500 as damages from the employer.[3, 4] But Scott incurred considerable expense, including expert witness fees, travel and discovery costs, and attorneys fees, in collecting from the employer. These litigation expenses, incurred in pursuing the claim for wrongful discharge, were directly caused by the union's failure to represent. The legal theory behind the *Czosek* doctrine derives part from the well-settled doctrine that a defendant tort feasor should pay as part of damages any legal fees incurred by plaintiff in an action against a third person when said fees are the proximate result of defendant's wrongful act, 22 *Am. Jur. 2d.* 235, *Damages,* § 166 (1965); 45 A.L.R.2d 1183 (1956). Examples of the theory treating legal fees as consequential damages in the labor context are employer suits against unions under Section 303 (b) of the Labor Management Relations Act for damages caused by illegal secondary boycott activities; *Sheetmetal Workers Local 233* v. *Atlas Sheet Metal Co.,* 384 F.2d 101 (5th Cir. 1967); *Gulf Coast Bldg. and Constr. Trades Council* v. *F. R. Hoar & Son,* 370 F.2d 746 (5th Cir. 1967); *Teamsters Local 984* v. *Humko Co.,* 287 F.2d 231 (6th Cir. 1961), *cert denied,* 366 U.S. 962 (1961). In these cases attorney fees incurred by the employer in having illegal picket lines removed — by court or N.L.R.B. proceedings — were recovered. Thus, it is clear that the inclusion of attorneys fees, as part of consequential damages at law has solid support.[5]

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[3] *Czosek* followed the teaching of *Vaca* v. *Sipes,* 386 U.S. 171 (1967) which held that a union is liable for "increases" in damages over and above those caused by the employer.

[4] The employer has also filed a petition for certiorari, protesting the Court of Appeals decision sustaining the verdict. See *Anchor* v. *Scott,* 74-6.

[5] See also *Vaughn* v. *Atkinson,* 369 U.S. 527 (1962).

The leading case dealing with the subject of attorney fees in unfair representation cases is *DeArroyo* v. *Sinchicato de Trabajordes Packinghouse,* 425 F.2d 281 (1st Cir. 1970), *cert. denied* 400 U.S. 877, where the court noted:

> "Federal courts have awarded attorney fees as a part of the successful plaintiff's recovery in the labor relations context in the absence of express statutory authorization (citations omitted) . . . we are inclined to think that such relief could be appropriate in a § 301 suit such as this one,"

and went on to say in a footnote that:

> "Mr. Justice Black, dissenting in *Vaca* v. *Sipes,* supra at 210, eloquently described the difficult route left open to the employee in this predicament. Moreover, the alleged wrong inflicted on the employee, loss of employment in violation of contractual rights; the anticipated recovery, perhaps too insubstantial to sustain competent counsel's best efforts to obtain a redress; and the ultimate purpose behind any recovery in such a case, making the employee whole, all suggest that the employee may need some financial assistance to press his claim, and if successful, should retain a substantial portion of the jury's 'lost earnings' award for himself. Finally, *the cost of attorneys fees is an injury to the employee directly attributable to and necessitated by the failure of the union and/or the employer to utilize the contractual grievance procedures designed to remedy breach of contract claims without resort to the courts."* (emphasis added)

The leading pre-*Vaca* case sanctioning an award of fees against a union that breached its duty of fair representation is *Rolax* v. *Atlantic Coast Line Ry.,* 186 F.2d 473 (4th Cir. 1951) where the court held:

> "The justification here (for an award of attorney fees) is that plaintiffs of small means have been subjected

> to discrimination and oppressive conduct by a powerful labor organization which was required as bargaining agent to protect their interests."

Following the *Rolax* and *Vaca* decisions, many unfair representation cases have allowed recovery of attorney's fees as a matter of equity, taxing them as costs, *Tischler* v. *Airline Pilots Ass'n*, 57 CCH Lab. Cas. 12,538 (S.D. Fla. 1968), aff'd 59 CCH Lab. Cas. 13,246 (5th Cir. 1968), where the court held:

> "In situations such as this wherein a member of a bargaining unit is pitted against a labor organization in an attempt to correct abuses, the allowance of attorney fees as part of the costs is a matter resting in the sound discretion of the trial judge."

The court in *Local 4706* v. *Steelworkers*, 68 L.C. ¶ 12,645 (W.D. Pa. 1972) held there was a "patent" breach of the duty of fair representation and that "in suits such as the instant one and in appropriate circumstances counsel fees may be awarded" and made an award of $5,000 fee. And in the very recent and as yet unreported wrongful discharge/unfair representation case of *Holodnak* v. *Avco Corp. and Local 1010 UAW*, Civil Action No. B-15, Dist. Ct. D. of Conn., August 15, 1974 (J. Lumbard sitting by designation), the court held it "has the power to award counsel fees despite the absence of express statutory authorization" and that the union's breach of duty "did contribute to plaintiff's need for counsel to assert his rights."

The union argues that counsel fees should be awarded, as a matter of equity, only "when overriding considerations of justice seemed to compel such a result," *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967). We believe that in most unfair representation cases, such overriding considerations are present and addi-

tional considerations such as bad faith and vindication of public policy are factors favoring an award.[6] These policies have been held to apply with equal force to allow recovery of lawyer's fees in suits against a union for the violation of Section 102 of the Labor Management Reporting and Disclosure Act of 1959.[7]

This Court recognized the problems a plaintiff like Scott faces, in the *Hall* case, citing with approval the Court of Appeals decision as follows:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor organizations to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but an empty gesture, for few union members could avail themselves of it." *Hall* v. *Cole*, 462 F.2d at 780-781.

In the case at bar, the mysterious disappearance of three of Scott's letters from the union files, the pattern of collusive bad faith representation and union ill-will, and the union's flagrant refusal to process a clearly meritorius grievance are factors making the granting of fees particularly appropriate.

In the normal wrongful discharge case, the union pays all expenses and legal fees of arbitration and the employee

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[6] In addition, unfair representation suits serve as an important instrument for enforcement of Section 8(b)(1)(a) of the Act and generally serve to benefit union members everywhere because of their deterrent effect. Plaintiff's counsel in effect is acting as a private attorney general, *Newman* v. *Piggie Park*, 390 U.S. 400 (1968).

[7] *Hall* v. *Cole*, 412 U.S. 1 (1973).

keeps one hundred percent of any back pay award. In order to accomplish the remedial purposes of the Act, the result in federal court should be the same.[8] The only way to make plaintiff "whole" is to ensure he receives attorney fees and litigation expenses. The National Labor Relations Board in agreement with this principle, has held that where a union is guilty of unfair representation it should pay plaintiff's attorney fees, *Local Unions Nos. 186 et al. Teamsters Union*, 203 NLRB No. 125 (1974). In *N.L.R.B.* v. *Local 485 I.U.E.*, 67 L.C. ¶ 12,371 (2nd Cir. 1972), the court approved the idea of the N.L.R.B. requiring a guilty union to furnish the member with "reasonable legal fees."

It was necessary for plaintiff who resides in Northern Kentucky, to retain a total of six attorneys — not due to his own fault, but because the locus of the trial kept shifting between Cleveland and Youngstown, and because of the difficulties of obtaining out of town co-counsel. It was necessary to retain three expert doctors. There was extensive discovery and pretrial motions, and travel to and from Cincinnati and Northern Ohio by counsel. During the period 1967 to 1972, counsel spent a minimum of 550 hours of work. Unless Scott receives his litigation expenses, he will receive for himself only about 40% of the jury award, after deductions. This Scott case is a further illustration of why all the reported cases favor an award of fees, and none exist, involving unfair representation, which favor defendant's position.[9] Thus, the Court of Appeals decision, remanding this case for a new hearing at which

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[8] The court in *Vaca* encouraged the lower courts to "fashion an appropriate remedy" when a breach of duty is proved.

[9] The union's brief does not cite any unfair representation cases which refute the principles set forth herein or deny the proposition that fees should be awarded.

time plaintiff shall have full opportunity to prove the nature and amount of attorneys fees caused by the union's unfair representation, is in accord with prevailing authority.

III. WHERE A UNION ACTING IN BAD FAITH FAILS TO FILE A MERITORIOUS GRIEVANCE IT MAY BE HELD LIABLE FOR DAMAGES.

Defendant's argument – that plaintiff did not properly exhaust his contract remedies, raises a question of fact which has already been determined by the jury. The jury, after listening to all the evidence, concluded that plaintiff by mailing his grievance to the union within seven days of the discharge, satisfied the contract's requirements. In any event, the union received the grievance within the requisite 10 days. There was ample time for the union to deliver the grievance to the employer's office which was located only a few miles from the union hall. Any technical failure to file with the employer was the fault of the union and not of Scott, who according to the jury acted reasonably in his attempt to exhaust remedies.

There is not one iota of testimony in the record of any union agent claiming that its reason for failing to file the grievance was its untimeliness. To the contrary, union agents at trial denied ever even inspecting the grievance (122-23). The court noted that there was no error in allowing the jury to apply the language of the contract to the facts and determine when the ten day limitation started to run, and to whom the grievance must be given. The jury resolved these and other factual issues related to the exhaustion issue in Scott's favor and the union has cited no principles of law requiring reversal of the jury's factual

determination. According to the contract and the practice, the union, not the employee, has prime responsibility for processing the grievance. Whether or not the employer received a copy of the grievance is, of course, irrelevant to the union's duty in the matter. Even if the employer had been adjudged immune from suit because of the union's failure to exhaust the grievance procedure, the union obviously bore responsibility for those damages caused by such misconduct.

IV. THIS CASE IS INAPPROPRIATE FOR CERTIORARI.

The only reason the trial court refused to grant plaintiff's post trial motion for an award of fees, was its belief that fees already had been granted by the jury as part of damages. When the Court of Appeals reversed the damage award as being too speculative, it was only fair to remand the entire matter of union liability for damages to the lower court for a rehearing. This decision was unique to the particular procedural framework of this case and hardly of great public concern. Whether the lower court will regard the matter of attorneys fees as recoverable as part of damages at law or as a matter of equity is as yet uncertain.[10] It would be premature at this point – when no final order lies against the union – to grant certiorari. If and when there is a final judgment which includes legal fees, the

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[10] There is some ambiguity in the Court of Appeals decision. By reversing the trial court's refusal to grant fees as a matter of equity, it suggests that upon remand the court and not a jury, should determine the matter. But by its language which talks of a remand "with instruction that the amount of damages . . be assessed" the opinion suggests that the rehearing could be before a jury and cover items of damage, in addition to litigation expenses.

lower courts will have adequate opportunity to rule on the many aspects of the issue which have yet to be decided, e.g. method of calculation, amount, factors to be considered, reasonableness of attorneys fees, relevance of any contingency fee contract, whether expert witness and travel expenses are includable, and whether trial by jury is permissible. Only then would the issues become ripe for consideration by this court.

Admittedly there are only a few cases concerning the subject matter of this appeal, because plaintiffs have had very few successes in Section 301 unfair representation litigation. The issue needs further development in the lower courts before review would be appropriate in this Supreme Court. The *Scott* case, with its peculiar unique features and which has yet to proceed to judgment, is hardly the appropriate vehicle for definitive exploration of the problem at this time.

CONCLUSION

This appeal from an order granting a new trial is premature. Furthermore, the court was correct in holding that the union, which was admittedly guilty of bad faith representation, is liable for damages, including expenses of litigation under the doctrines of *Vaca, Czosek* and *Hall.*

For all these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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